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Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations

Irma S. Russell
University of Montana School of Law, irma.russell@umontana.edu

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KEEPING THE WHEELS ON THE WAGON: OBSERVATIONS ON ISSUES OF LEGAL ETHICS FOR LAWYERS REPRESENTING BUSINESS ORGANIZATIONS

Irma S. Russell[1]

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I. INTRODUCTION

One of the foundational principles of the attorney-client relationship is that the client, rather than the lawyer, determines the objectives of the representation.[2] Accordingly, corporate counsel should not invade the province of the client by taking over the client's decision-making, even when – as is often the case in corporate representations – the business decision will have significant legal consequences.[3] The fact that the lawyer does not make the business decisions for the corporate client does not mean the lawyer's role is unimportant, however. On the contrary, the role of legal advisor is of crucial importance to the welfare of the corporate client and others who depend on the viability of that corporation.[4] Counsel's role is to advise the corporate representatives who make the corporation's business decisions about the law, the legality of different courses of action, and the possible consequences of choices available. Such advice may appropriately include social, moral, and political dimensions in addition to legal information.[5] By fully advising clients, corporate lawyers help keep the enterprise moving. They "keep the wheels on the wagon," warning the client of dangers on the road ahead. To develop the metaphor, corporate counsel helps managers and executives steer the enterprise away from legal hazards and avert the poten-

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2. *See* MODEL RULES OF PROF'L CONDUCT [hereinafter MODEL RULES] R. 1.2 (2002).

3. *Id.* MODEL RULE 1.2(a) also suggests that the lawyer's role includes determining the means by which client objectives should be pursued. *Id.* In the same sentence indicating that the client is entitled to set the objectives of the representation, the rule states that the lawyer must consult with the client regarding the "means" of achieving objectives. *Id.* "[A]s required by Rule 1.4, [the lawyer] shall consult with the client as to the means by which they [the objectives] are to be pursued." *Id.* Comment 1 to the rule echoes this obligation of the lawyer to consult with the client. MODEL RULE 1.2 cmt. 1. Comment 2 notes the anticipated division of decision-making between lawyer and client:

> Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

MODEL RULE 1.2 cmt. 2. MODEL RULE 1.4 reiterates this approach and other rules and comments build on this theme. *See, e.g.*, MODEL RULE 1.4 cmt. 5.

4. The cumulative effects of corporate vitality and honesty impact the economy generally and millions of employees and shareholders individually. Protecting against such harm serves the public interest. A more philosophical and broader metaphor of lawyers as individuals who prevent harm is presented by Justice Stewart G. Pollock. *See* Stewart G. Pollock, *Lawyers and Judges as Catchers in the Rye*, 34 TULSA L. J. 1 (1998).

5. *See* MODEL RULES, pmbl., para. 9; MODEL RULE 2.1 cmt. 2.

tial disaster from failing to comply with the law. For the benefit of all concerned, the lawyer must fully advise clients on the law and the importance of compliance with the law. Lawyers should believe that compliance with the law is a worthy goal and that compliance benefits the client as well as society. The long-term health and productivity of a corporation depends not only on developing and implementing a profitable business strategy, but also on complying with the law. Thus, despite the fact that corporate counsel should not make business decisions, he has a central role in maintaining the financial health of the corporate client.

In recent months, the wheels have come off several major U.S. corporations, causing losses for shareholders, employees, and others. The catastrophic effects of deceptive corporate practices, including misleading off-balance sheet bookkeeping and fraudulent loans, illustrate the dangers of self-dealing on the long-term viability of corporations and the economic health of the nation.[6] Inflated corporate earnings reports of WorldCom, Enron, and other corporations spurred investigations and prosecution for criminal fraud, resulting in further scandals and losses. Falling share values and employment levels, restatements of corporate earnings, downgrading of credit ratings, bankruptcy litigation, and other negative consequences have followed, exacerbating a downward trend in the economy at large.[7]

The significance of corporate vitality to the economy of the country and to the well-being of investors and employees can hardly be overstated. Congress and the Securities and Exchange Commission (SEC or Commission) have sought to enhance corporate accountability in an effort to restore investor confidence and reinvigorate the U.S. economy.

> Recent events underscore what we already knew – confidence in our capital markets cannot be maintained if the public believes that corporate leaders, their advisors or their cohorts, are "gaming" the system and focusing principally, if not exclusively, on their own personal gain. We must reassure investors after the string of recent scandals that such abuses of the system are not, and will not be allowed to become, the norm in American business.[8]

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6. For a full discussion of the accounting practice of keeping two sets of books on the finances and income of a corporation, *see* Anthony J. Luppino, *Stopping the Enron End-Runs and Other Trick Plays: The Book-Tax Accounting Conformity Defense*, 2003 COLUM. BUS. L. REV. 35 (2003).

7. The causes of the current corporate problems are the subject of intense speculation. *See, e.g.*, John Cassidy, *The World of Business: The Greed Cycle*, THE NEW YORKER, Sept. 23, 2002, at 64.

8. Speech by SEC Chairman Harvey L. Pitt: Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (Aug. 12, 2002), *available at* http://www.sec.gov/news/speech/spch579.htm (last visited Apr. 27, 2003).

The role of corporate lawyers as well as that of corporate executives and accountants has been called into question by recent market disasters.[9] "The actions of some attorneys have drawn increasing scrutiny and criticism in light of recent events demonstrating that at least 'some lawyers have forgotten their responsibility.'"[10] Both the law and lawyers play vital roles in the economic life of society. Clear legal advice and accurate projections of the consequences of the options available to the corporation enhance the viability and profitability of the corporate client.

This Article explores the obligations of the lawyer to the corporate client and to society. It examines both established principles and recent developments relevant to the lawyer's role. Part II of the Article discusses some of the rules of legal ethics that provide both guidance and restraints on corporate counsel. It focuses on the lawyer's duty to provide the client with independent professional judgment and to keep the client informed about the representation. It also explores the lawyer's duty to maintain the confidentiality of client information and duties specific to representing an organizational client. Part III explains recent developments that may affect the role of corporate counsel, including the first comprehensive revision of the ABA Model Rules of Professional Conduct in since 1983[11] and the SEC's promulgation of Rule 205 pursuant to the Sarbanes-Oxley Act of 2002.[12] Part IV assesses the obligations of lawyers in light of the cumulative effect of the two systems: laws and ethics rules. It concludes that a system of justice based on the principle of rule of law must take account of public policy articulated by legislative and judicial authority and must make judgments based on conduct rather than the status of parties involved in legal issues.

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9. *See, e.g.*, Mike France, *What about the Lawyers?*, Bus. Wk., Dec. 23, 2002, at 58; *see also* Richard A. Oppel Jr., *Lawyer Warned Enron Officials of Dubious Deals*, *available at* N.Y.Times.com/2002/02/ 07/business/ (noting that lawyer Jordan Mintz proposed several ways to correct problems at Enron nearly a year before the company collapsed); Lawrence A. Cunningham, *Sharing Accounting's Burden: Business Lawyers in Enron's Dark Shadows*, 57 BUS. LAW. 1421 (2002) (noting the distinction between the role of lawyers and auditors).

10. *Implementation of Standards of Professional Conduct for Attorneys*, *available at* http://www.sec.gov/rules/proposed/33-8186.htm (quoting remarks by Senator John Edwards, 148 Cong. Rec., at S6551 (July 10, 2002)); *see also* S.E.C. Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 CFR Parts 205, 240, 249, [Release Nos. 33-8186; 34-47282; IC-25920; File No. S7-45-02] RIN 3235-AI72.

11. Environmental practice provides the context for some discussion in this Part, as an area where the competing interests of society and the client can be dramatic.

12. The Sarbanes-Oxley Act § 307 ordered the SEC to promulgate regulations to require that lawyers representing corporations subject to the Act report evidence of material violations of securities regulations to authorities within the corporation. In response to the Act, the SEC has promulgated proposed and final rules on the reporting inside and outside the corporate entity.

II. THE RULES OF ETHICS FOR CORPORATE COUNSEL

The rules of legal ethics apply to all lawyers, without regard to whether the lawyer represents individual or organizational clients or whether the lawyer is "outside" (retained) counsel or an employee of the client ("house" counsel). The Preamble to the Model Rules of Professional Conduct explicitly acknowledges the point: "Every lawyer is responsible for observance of the Rules of Professional Conduct."[13] Likewise, the Preliminary Statement to the Model Code of Professional Responsibility notes that "[d]isciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."[14] Although the same rules apply to all lawyers practicing within a jurisdiction, context is significant in the application of the rules of legal ethics.[15] Different types of legal representation present different challenges.[16] For example, the in-house lawyer is inevitably more economically dependent on his single client than a lawyer representing numerous clients.[17] Indeed, the insider counsel is in essence "wedded" to the corporate client.[18] The reality of the employed corporate counsel's greater dependence on his employer-client should not be ignored in

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13. MODEL RULES, pmbl., para. 12.

14. ABA MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement *reprinted in* REGULATION OF LAWYERS STATUTES AND STANDARDS 534 (Stephen Gillers & Roy D. Simon eds. 2002).

15. *See* Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873 (2002) (noting some of the problems associated with protocols of lawyer conduct); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993) (noting distinctions between "lawyers as counselors" and "lawyers as litigators").

16. Some scholars have criticized the Model Rules for failing to acknowledge the particular concerns of lawyers practicing in specific settings with specific problems such as environmental law or corporate practice. *See, e.g.* J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825 (1994); Douglas R. Williams, *Loyalty, Independence and Social Responsibility in the Practice of Environmental Law*, 44 ST. LOUIS U. L.J. 1061 (2000).

17. For example:

> More than with outside counsel, corporate in-house counsel may be faced with a moral dilemma between ethical norms and the client's interest, since in-house counsel is dependent on one employer to provide his or her livelihood and career success. Therefore, an in-house attorney faced with a choice between the demands of an employer and the requirements of an ethical code has an even greater claim to judicial protection than a nonattorney employee.

General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 1164-65 (Cal. 1994). In difficult economic times, the dependent nature of the house counsel on his employer is even greater. *See, e.g.*, Matt Kelly, *The Attorney, Unemployed: The lawyer jobless rate has doubled since the boom*, THE NAT'L L.J., APRIL 10, 2003, *available at* http://www.law.com/servlet/ContenServer?pagename=OpenMarket/Xcelerate/Preview&c=LawArticle&cid=104858251066 (last visited Apr. 28, 2003).

18. *See* Marc I. Steinberg, *The Role of Inside Counsel in the 1990s: A View from Outside*, 49 SMU L. REV. 483, 484 (1996).

application of the rules relating to such representations.[19] Likewise, the lawyer should recognize the inherent tendency to identify with his corporate client and guard against loss of independence.[20]

While corporate counsel's primary role is to advise the client of the law, fulfilling this role involves in-depth knowledge of the client's business and application of the law to business practices. Like other lawyers, those who represent a corporation must balance duties to the client, the justice system, and others. On one hand, the lawyer owes the client confidentiality, loyalty, and diligence. On the other hand, the lawyer has duties to society and non-clients, such as the duty to avoid assisting a client (or anyone) in a crime or fraud and the lawyer's duty of candor to the court and others. That the task of balancing these interests is inherent in lawyering is apparent from the statement of principles of legal ethics.

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. . . . The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. . . . Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.[21]

Corporate Counsel's Role

(1) The Duty to Provide Candid Advice

Lawyers are routinely called upon to exercise moral judgment in advising clients. In the corporate setting, lawyers often become trusted advi-

19. *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS § 13.7.5, at 741 (1986). The commentary and discussion in SEC Proposed Rule 205 recognize the distinction between retained and in-house counsel in the noisy withdrawal proposal. *See* Comment of Richard W. Painter, Visiting Professor of Law, University of Michigan Law School, Ann Arbor, December 18, 2002, on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys [Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02] (speaking favorably of the Commission's different rule for inside counsel and retained for disaffirming own work product, which has been used to perpetrate a fraud) *available at* http://www.sec.gov/rules/proposed/s74502/rwpainter1.htm (last visited Apr. 27, 2003).

20. In discussing this point in relation to the case of *Balla v. Gambro*, 584 N.E.2d 104 (Ill. 1991), one lawyer noted that corporate counsel should always keep "your resume up-to-date and your bags packed." Panelist on ABA Panel on Ethics in Environmental Practice, New Orleans ABA Environmental Section Fall Meeting, September 23, 2000.

21. MODEL RULES, scope, para. 14-16.

sors not only for their legal knowledge, but also for the practical wisdom they offer. The Preamble to the Model Rules acknowledges that the law, their personal conscience, and the approbation of peers, in addition to the rules of ethics, should guide lawyers.[22] Lawyers serve their clients not only by providing technical legal expertise, but also by helping advance good corporate decision-making and urging compliance with the law. Because the lawyer's role is to explain the law and its impact on the corporation in particular transactions, the attitude that the lawyer projects to the corporate client about compliance inevitably influences the way the organization regards compliance. If the lawyer gives his explanation with a "wink and a nod" or with the attitude of "everyone does it" the corporation will take its cue from the lawyer's attitude as much as from his statement of the law. Clearly, compliance with the law is in the enlightened self-interest of the client.[23] The lawyer with serious regard for the law will influence client decisions in a positive way, communicating that compliance with the law has a long-term benefit for the corporation.

The Scope section of the Model Rules notes that the Rules do not "exhaust the moral and ethical considerations that should inform a lawyer . . . ."[24] The Model Rules note that "many difficult issues of professional discretion" arise in practice, the Scope section to the Model Rules states that ethics issues "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[25] In discussing the lawyer's role as advisor, Model Rule 2.1 acknowledges that the role of lawyers to advise clients properly extends beyond providing a summary or explanation of the law to clients. Of great significance is the mandatory nature of the lawyer's duty to exercise independent professional judgment: "In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation."[26]

The obligation of lawyers to both society and individual clients is axiomatic. Indeed, the role of lawyers to serve individual clients is justified by the over-arching benefits to society and the system of justice. The Pre-

22. *See* MODEL RULES, pmbl., para. 6.

23. Comments of Richard W. Painter, Visiting Professor of Law, University of Michigan Law School, Ann Arbor, December 18, 2002, on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys [Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 *available at* http://www.sec.gov/rules/proposed/s74502/rwpainter1.htm (last visited Apr. 27, 2003) (noting that Section 307 "will allow honest lawyers and clients to thrive in a legal and economic system that values disclosure – including disclosure by lawyers to their own clients – over deceit.").

24. *See* MODEL RULES, scope, para. 16.

25. *See* MODEL RULES, pmbl., para. 9.

26. MODEL RULE 2.1 (emphasis added).

amble to the Model Rules of Professional Conduct makes the point more than once. It states, for example, that "[t]he profession has a responsibility to assure that its regulations are conceived in the public interest."[27] Additionally, the Preamble states the importance of the lawyer's role in society is "vital" to the "preservation of society."[28] It concludes that "[t]he fulfillment of this role requires an understanding by lawyers of their relationship to our legal system."[29]

Corporate counsel should advise the client of the legal, economic, political, and moral consequences of its future potential actions. This is no small task. It is particularly challenging when the legal issues involved or scientific data are unclear or when the lawyer's advice runs counter to the desires of the client. Recognition that lawyers as legal advisors may sometimes refer to moral, economic, social, and other factors suggests that lawyers are not merely legal technocrats or "hired guns," despite the fact that they seek to further the client's objectives when the objectives are legal. Comment 2 to Model Rule 2.1 indicates that the scope of the lawyer's role is not limited to purely legal or technical considerations:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[30]

This comment underscores the point that the role of the lawyer is broad and cannot be properly achieved by abdicating professional judgment to the client or tailoring advice to suit the client's desires. Lawyers sometimes complain that clients are not interested in the lawyer's evaluation of their objectives but merely in the lawyer's ability to further those objectives. This attitude of some clients can be summed up as: "Don't tell me whether to pursue this objective. Just tell me *how* to achieve it."[31] A lawyer who capitulates to the client's desires, blindly serving the client's wishes without judging the legality of those wishes, may be a short-term hero, but he vio-

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27. MODEL RULES, pmbl., para. 12.
28. MODEL RULES, pmbl., para. 13.
29. MODEL RULES, pmbl., para. 13.
30. MODEL RULE 2.1 cmt. 2.
31. This statement does not necessarily mean that the client intends to pursue his plans without regard to their legality or illegality. The statement may simply mean that the lawyer needs to educate the client on the limits of his legal right to pursue an objective in the manner he wishes.

lates his professional duty to the client. Setting aside his independent judgment constitutes a breach of the lawyer's professional responsibility.[32] Moreover, such a breach makes the lawyer vulnerable to the risk that his hero status will vanish when a judicial or agency decision disagrees or investigates his reasoning. Exploiting opportunistic advantage involves embracing long-term risks. The lawyer who shrinks from the obligation of providing candid and independent judgment, or "spins" the law in favor of the client's desires, risks unfavorable results in the long run. Whether the lawyer drafts a contract that overreaches the other party or interprets a regulation to allow the client to disregard or water down a reporting obligation, the risk of unfavorable outcomes is a real one for both the client and the lawyer. In other words, enlightened self-interest as well as professionalism suggest that the lawyer should urge both compliance with law and fair dealings generally. The "hired gun" approach may seem profitable in the short run – until a court refuses enforcement of a contract term based on the obligation of good faith and fair dealing[33] or regulators launch an enforcement action against the client.[34] In some cases, the regulators pursue the lawyer as well as the client, with significant personal and professional consequences for each. "Even a lawsuit that never results in a judgment can have a potentially ruinous effect on a lawyer's reputation and career."[35]

Model Rule 2.1 demands that lawyers exercise independent judgment. It establishes the propriety of communicating "relevant moral and ethical considerations" in advising clients.[36] Taken seriously, this professional rule is not simply a matter of the preferences or inclinations of the lawyer. It is not merely the lawyer's right of personal expression. Rather, it is the lawyer's obligation. He is charged by the rules of ethics and his unique role in the social order to deliver an objective view of legal requirements – even if it undercuts the client's plans. Exercising independent professional judgment is mandatory.[37] The lawyer owes the client a candid evaluation of the propriety and risks of a course of action. Moral and political reasoning provide the tools for fulfilling this mandatory role. "Although

32. *See* MODEL RULE 2.1 (stating that the lawyer "shall" exercise independent professional judgment).

33. *See* UCC 1-203, RESTATEMENT (THIRD) OF THE CONTRACT LAW § 205; *see also* Bak-A-Lum Corp. of America v. Alcoa Bldg. Prod., 351 A.2d 349 (N.J. 1976) (holding obligation of good faith and fair dealing required manufacturer to give plaintiff-distributor adequate notice of termination of exclusive distributorship to allow plaintiff to recover profits); Zilg v. Prentice-Hall, Inc., 717 F.2d 671 (2nd Cir. 1983) (holding publisher had implied duty of obligation of good faith in promoting book it published).

34. *See generally* W. Frank Newton, *A Lawyer's Duty to the Legal System and to a Client: Drawing the Line*, 35 S. TEX. L. REV. 701 (1994).

35. Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU. L. REV. 225, 227 (1996) (describing the threat of civil liability for securities lawyers in particular).

36. MODEL RULE 2.1 cmt. 2.

37. The rule states that the lawyer "*shall* exercise independent professional judgment." MODEL RULE 2.1 (emphasis added).

a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[38] For this reason, the lawyer who bites his tongue rather than voice the unpleasant argument against a client's course of action fails more than his own conscience; he fails to fulfill the foundational duty of providing candid legal advice.

(2) The Client's Objectives

The Model Rules take as the baseline of the relationship between lawyers and clients that clients have a right to decide the goals of a representation. Thus, the rules require lawyers to "abide by a client's decisions concerning the objectives of representation,"[39] to keep the client informed of the matters of the representation, and to consult with the client regarding the means of achieving the client's objectives.[40] Model Rule 1.2 states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."[41] This rule sets a significant starting place for analysis of the relative roles and powers of lawyers and clients. The rule respects the client's "ultimate authority to determine the purposes to be served by legal representation."[42] It also recognizes "the limits imposed by law and the lawyer's professional obligations."[43]

When a lawyer disagrees with the client about the way to proceed in a matter, the rules impose a duty on the lawyer to consult with the client and seek a resolution of the disagreement. Only after such a consultation should a lawyer take the step of withdrawing from a representation over a disagreement with a client. "The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation."[44] This point focuses on the attorney-client relationship *in media res,* after a problem has arisen.

In the corporate setting, the goal setting and the evaluation of goals in light of the legal consequences often do (and should) be integral parts of one cohesive process. Thus, corporate counsel should be an integral part of the business decision-making, assisting the client in clarifying and prioritizing goals in light of the law. The corporate setting can present complicating

38. MODEL RULE 2.1 cmt. 2.
39. MODEL RULE 1.2(a). *See also* Lord v. Money Masters, Inc., 435 S.E.2d 247 (Ga. App. 1993).
40. MODEL RULE 1.2(a), 1.4; *see also* Joos v. Auto-Owners Ins. Co., 288 N.W.2d 443 (Mich. App. 1979) (finding duty to inform the client of settlement offer).
41. MODEL RULE 1.2(a).
42. MODEL RULE 1.2 cmt. 1.
43. *Id.*
44. *Id.* at cmt. 2.

factors relating to what person has the authority to set the objectives of the client and what person or persons the lawyer should contact to fulfill the role of urging compliance.[45]

(3) Prohibition Against Assisting in Wrongful Conduct

The rules counterbalance deference to the client's objectives by prohibiting lawyers from knowingly assisting in wrongful or fraudulent activity.[46] Model Rule 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Although lawyers must not aid a client in circumventing the law, the rules expressly protect the right of the lawyer to advise a client regarding whether particular conduct violates the law. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[47]

A comment to Rule 1.2 makes the point that, despite the prohibition against aiding a client in breaking the law, the rules protect the lawyer's right to explain the law to the client.

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.[48]

Of course, courts rather than lawyers are the ultimate arbiters of the question whether conduct amounts to assistance in breaking the law. The comment suggests to courts that they should require specific evidence that a lawyer knowingly aided a client in an unlawful venture before holding the

45. Model Rule 1.13, considered in subsection (b), discusses the role of corporate counsel in making these difficult decisions. MODEL RULES, *supra* note 1, at R. 1.13.
46. *See* MODEL RULE 1.2(d).
47. MODEL RULE 1.2(d).
48. MODEL RULE 1.2 cmt. 9.

lawyer complicit in violations of the law. Moreover, it urges courts not to draw an inference of wrongful assistance from the fact that a lawyer provides information about the law that the client used unlawfully.

When client objectives are contrary to law or the client persists in conduct that the lawyer finds repugnant, the lawyer may withdraw from the representation.[49] The rules provide substantial discretion to lawyers in making the decision to withdraw from a representation.[50] The rules also note that the problem of assistance is particularly difficult if the lawyer discovers client wrongdoing during a representation. "When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate."[51] In such a case, the rules require that the lawyer withdraw or withdraw and disaffirm any work product that the client may be using.[52]

The line between advising the client about the law and assisting in a crime can be a thin one. Lawyers face a dilemma when the client asks about the likelihood of prosecution for particular conduct. For example, enforcement of environmental disclosure laws has varied from administration to administration. When a client asks a lawyer about the likelihood of prosecution, the truth may be that the likelihood of any enforcement is extremely low. In the case of environmental reporting, for example, such information may encourage a client to disregard its obligation to report. It may facilitate the client's avoidance of complying with the law. Nevertheless, this communication of information appears to fall on the protected side of the line drawn by Comment 9 to Rule 1.2.[53] The lawyer should note to the client that fear of enforcement is not the only reason for compliance with the law. Moreover, other law underscores the lawyer's duty to urge clients to comply

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49. *See* MODEL RULE 1.16.

50. Similarly, the decision of whether to accept a representation is essentially unlimited. *See* Nathan M. Crystal, *Developing a Philosophy of Lawyering,* 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (2000).

51. MODEL RULE 1.2 cmt. 10.

52. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. *See* Rule 4.1. MODEL RULE 1.2 cmt. 10. *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-376 (Aug. 6, 1993) (noting "noisy withdrawal" may not be "entirely effective" in dealing with client fraud likely in pretrial stages of a case); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (Aug. 8, 1992) (noting that Rule 1.16 requires a lawyer to withdraw from a representation in which a client is using a lawyer's services or work product to perpetrate a fraud and further that the Rule permits the lawyer to disaffirm documents prepared in the representation that will be used to further the fraud).

53. In one sense, SEC Rule 205 passed pursuant to the Sarbanes-Oxley Act has the effect of taking away from the lawyer the benefit of this comment and, thus, making the agency more like a tribunal in terms of the balance of interests struck in favor of disclosure. *See* MODEL RULE 3.3.

with the law, to refrain from assisting or engaging in unlawful conduct. Lawyers are subject to state and federal statutes and the common law.[54] Lawyers must comply with state and federal laws and regulations, rules of civil procedure, and the common law. In other words, lawyers do not get a "free card"[55] to obey or ignore laws based on the status of being a lawyer.

(4) The Duty to Keep the Client Informed

Model Rule 1.4 states another important tenet of the lawyer-client relationship, requiring that the lawyer keep the client informed about the representation. Among other things, it declares that the lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed about the status of the matter." It states the lawyer's duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 1 to Rule 1.4 notes the need for "[r]easonable communication between the lawyer and the client" to enable the client "effectively to participate in the representation." Comment 5 develops the theme:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.[56]

This common sense requirement is essential to achieving the purposes of hiring a lawyer in the first place. Comment 6 to Model Rule 1.4 notes the intersection of this rule with the rule on organizational clients. "When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization."[57]

Like other clients, the organizational client must have information about the law in order to comply with the law while seeking to achieve its business purposes. Unlike human clients, however, the organizational client

54. *See, e.g.*, Bennett v. Berg, 710 F.2d 1361 (8th Cir. 1983) (refusing to dismiss RICO claim against lawyers).

55. This use of "free card" is based on the monopoly move of having a "get out of jail free" card.

56. MODEL RULE 1.4 cmt. 5.

57. MODEL RULE 1.4 cmt. 6.

may involve multiple decision makers who may have divergent views and conflicting personal interests. Representation of an organization may span a variety of projects and goals. These realities of representing organizational clients as well as the different rules applicable to the organizational setting can make the role of the lawyer different in the corporate context. The vision of the Model Rules regarding corporate counsel's role in advising the client comes into focus in Model Rule 1.13.[58]

(5) The Duty of Confidentiality

Confidentiality is one of the core principles of the legal profession.[59] The principle of confidentiality is expressed both in the rules of legal ethics and in the law of evidence in the attorney-client privilege. Model Rule 1.6 establishes the lawyer's duty of confidentiality and the ability of the lawyer to reveal such confidences in limited circumstances.[60] An important underlying purpose of the duty is to encourage the free flow of information between clients and their lawyers.[61] The duty extends to existing, former, and prospective clients, and it has special importance in the corporate setting because of corporate counsel's extensive knowledge of the business operations of the client. While confidentiality is undoubtedly one of the most important duties that lawyers owe clients, it is not an absolute, and lawyers should not assume that it provides shelter for every decision.[62]

The 1983 version of Model Rule 1.6 has been the subject of intense debate.[63] The ABA's statement of confidentiality adopts a minority approach that is out of step with the majority of jurisdictions in the country.[64] Nevertheless, the ABA's statement of the principle has continuing impor-

58. *See infra* notes 70-85 and accompanying text.

59. It has been called the "central moral tradition of the profession." Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990).

60. Legal scholars have criticized the rule and the ABA Standing Committee on Ethics and Professional Responsibility proposal amending the rule. *See generally* Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 721-24 (1993).

61. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 6.7, 1-3 at 296-300 (1986); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1096 (1985).

62. *See* Nix v. Whiteside, 475 U.S. 157, 158 (1986) (holding that the duty of confidentiality does not require an attorney to assist a client's fraud or to allow it to go unpunished).

63. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION, 109 (2000); GEOFFREY C. HAZARD, JR. & WILLIAM HODES, 1 THE LAW OF LAWYERING § 1.6:102, at 130.2 (1997 Supp.). *See generally* Irma Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117 (1998).

64. *See* Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 n.92 (2003) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. f (2002)) (noting that 37 states permit lawyers to reveal confidential client information in order to prevent the client from committing criminal fraud).

tance. This is true even though the ABA has now modified the rule in significant ways. Most states will revise their rules in response to the ABA's comprehensive 2002 revisions of the rules.[65] Nevertheless, it is noteworthy that the Model Rules failed to secure the goal of uniformity in the area of the duty of confidentiality. While nearly all states adopted the ABA Model Rules of Professional Conduct, few accepted the 1983 version of the model rule as promulgated by the ABA.[66] Most states incorporated significant variations, moderating the duty in cases of superior interests of others and public policy. The 1983 version of Model Rule 1.6 states:

> Confidentiality of Information:
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

This statement of the duty of confidentiality sets the scope of the duty broadly, prohibiting a lawyer from revealing "information relating to representation of a client."[67] It creates two exceptions, permitting disclosure of information (1) to prevent the client from committing a crime that is likely to result in "imminent death or substantial bodily harm," and (2) to protect the lawyer's interests (sometimes referred to as the "self-defense

65. At the time of this Article, North Carolina is the only state that has revised its ethics rules based on the 2002 Model Rules. E. Fitzgerald Parnell, III, *Proposed Revisions to the Rules of Professional Conduct*, *available at* http://www.ncbar.com/home/proposed_rules.asp (last visited Apr. 29, 2003).

66. *See* Russell, *supra* note 63, at 172.

67. MODEL RULE 1.6(a).

exception").[68] A literal reading of the 1983 rule prohibits disclosure even for the purpose of preventing a life-threatening act if the act is not a crime. The Rule does not counsel or require disclosure in any case, even if the disclosure would prevent harm to the general public or large numbers of people. It provides no avenue for disclosure to avert economic injuries, even if the injuries are of a magnitude of the Enron disaster. It includes no normative statement that a lawyer should disclose information in any case. Indeed, a lawyer who knows of terrorist acts planned by a client would not violate Model Rule 1.6 by remaining silent. The absolute nature of the 1983 version of the rule set the stage for legislative reform as well as reform of the rule itself through the ABA process of amendment.[69]

The Organizational Client

No understanding of corporate counsel's role under the ABA Model Rules is possible without exploring Model Rule 1.13, which addresses specifically the lawyer's duties in the context of representing organizations, including corporations.[70] Indeed, reference to the rules of general applicability explored above can be misleading when applied to corporate counsel because the principles relating to advising and keeping the client informed about the representation are modified significantly in the context of the organizational client. Accordingly, a lawyer representing a corporation or other organizational client should consider each of the duties discussed above in light of Model Rule 1.13.

(1) The Identity of the Client

The rule mandates that the lawyer representing an organizational client act for the entity rather than for its constituents.[71] Determining whom the lawyer represents is a crucial threshold question of any representation.[72] Because an organizational client is not a person, it must act through individuals. Its existence as a person is a legal fiction in a certain sense. While the officers, directors, and employees act for the organizational client, they are not the client. The lawyer representing a corporation owes his allegiance

68. MODEL RULE 1.6(b)(2). *See* Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 762 n.73 (2001) (pointing out that the term is a misnomer).

69. *See* Russell, *supra* note 63, at 117 (noting the categorical operation of Rule 1.6).

70. *See* MODEL RULE 1.13 cmt. 6 (revised 2002).

71. *See supra* note 18 and accompanying text. "Group claim" in this context means a non-divisible claim advanced by a group of individuals, such as a petition to EPA's Office of Civil Rights seeking denial of a permit or other prospectively protective action.

72. *See* John M. Burman, *Who is the Client, and With Whom Should the Lawyer Interact?*, 25 WYO. LAW. 37 (April 2002) (discussing Wyoming cases addressing the issue of client identity).

to the corporate entity rather than to the individuals who are constituents of the corporation.[73]

Model Rule 1.13 recognizes that the highest authority in a corporate client is the board of directors.[74] Comment 4 to the rule states: "The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body."[75] Similarly, Comment 3 to Model Rule 1.13 states: "Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority." Thus, the rules identify the board of directors as the embodiment of the client. This point is consistent with substantive corporate law.[76] The comment specifies immediately following the preceding statement that, in some circumstances, the board of directors may delegate responsibility to another body. "[A]pplicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation."[77] An example of such a delegation is found in SEC Rule 205, passed pursuant to the Sarbanes-Oxley Act. It authorizes the board of directors of an issuer to establish a "qualified legal compliance committee" (QLCC) as the body to receive information about violations of SEC rules or laws.[78]

(2) Confidentiality and the Organizational Client

In representing a corporate client, the lawyer will often obtain information from officers, directors, employees, and constituents of the client. Generally, information imparted to the lawyer is subject to the duty of confidentiality and the attorney-client privilege. Close working relationships that extend over years or intense and important projects can create a feeling in both corporate employees and lawyers that the lawyer protects their interests. Frequent repetition of the fact that the lawyer represents the corporation rather than individuals is necessary. This important basic principle can

73. *See* MODEL RULE 1.13(a) (derived from EC 5-18 of the Model Code); Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501, 1505-06 (9th Cir. 1993); Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, 1184-85 (S.D.N.Y 1979) (noting that lawyer's duty of care runs to the corporate entity rather than to officers or directors). *See also* George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597 (1998).

74. MODEL RULE 1.13 cmts. 3, 4.

75. MODEL RULE 1.13 cmt. 4.

76. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (identifying the plenary power of the board of directors "except as may be otherwise provided in this chapter or in its certificate of incorporation").

77. MODEL RULE 1.13 cmt. 4.

78. Rule 205 empowers an issuer to establish a "qualified legal compliance committee" (QLCC) to receive reports of violations of law in the securities context. *See* 17 C.F.R. Part 205.2(a).

be hard for the lawyer as well as for the corporate employees who work with the lawyer.[79]

(3) Advising the Organizational Client of Violations of Law

Model Rule 1.13(b) guides the lawyer who learns that someone within the organization intends to violate a legal obligation. The rule presents two situations: the first involves self-dealing by a constituent of the company and the second involves a violation of the law.

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.[80]

The trigger for action permitted by Model Rule 1.13 requires interpretation. The first of two situations involves self-dealing. An officer, employee, or other constituent is engaged in, or intends to engage in, a violation of "a legal obligation *to* the organization." This part of the rule explains that the lawyer should counter self-dealing to protect the corporation. The rule includes no limitation on the trigger for lawyer action. When the lawyer learns of self-dealing by a constituent, he should act as directed in the rule, revealing the problem to higher authorities within the corporation. The second situation, involves a "violation of law." The rule seems to limit its application to significant circumstances by the element that the conduct "is likely to result in substantial injury to the organization." This "substantiality" limitation differs from the general duty of advising clients under Model Rule 1.4, which contains no "substantiality of injury" requirement in the ordinary case of representation of individual clients.

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79. It is a principle that lawyers must take seriously, however, not only as a matter of doing the right thing as a matter of the ethics rules, but also from a liability standpoint. If the lawyer remains in the employ of the client after he has evidence of criminal violations, the lawyer may well be subject to sanctions, both civil and criminal. One consequence of Rule 205 may be to narrow the realm of plausible deniability of lawyers as well as clients when violations are being scrutinized after charges have been filed. *See, e.g.*, Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1430 (2000) (considering the vantage point of both society and clients in the choice of disclosure rules); Donald C. Langevoort, *Where Were the Lawyers?, A Behavioral Inquiry into the Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993) (noting the tendency of lawyers to identify with their clients).

80. MODEL RULE 1.13(b).

Subsection (b) sets forth an up-the-ladder reporting system for advising in a bureaucracy,[81] presumably to minimize disruption within the organization. Read literally, the rule requires four elements before the lawyer is authorized to act: (1) The lawyer must "know" that a constituent is violating. (2) The violation must be related to the representation the lawyer provides. (3) The violation must be one that might reasonably "be imputed to the organization." Finally, (4) the violation must be of a type "likely to result in substantial injury to the organization." Model Rule 1.13 appears to authorize lawyer discretion to move the issue "up the ladder" only when the four elements are met. Assuming that the lawyer knows with certainty that a violation of law may be attributable to the client and, further, that the likelihood of enforcement is essentially zero, the rule seems to require that the lawyer remain silent. In this setting, the rule appears to withhold authorization of the lawyer to report the information about the violation "up the ladder." Nevertheless, the language leaves room for another interpretation. Preferring an interpretation of an agreement or statute that produces legal undertakings, one should not conclude that Model Rule 1.13 requires silence by the lawyer in the face of a violation of the law that he believes would not be discovered. To adopt such an interpretation traps the lawyer in a relationship of conspiracy. It would require that a lawyer fully inform the client about the law but denies the lawyer the right to fully inform the client of wrongful acts (violations of law) by constituents except when the four elements described above are present. Recognizing that compliance with the law is in the long-term self-interest of the client and, thus, in the terms of the rule, violating the law is against the long-term self-interest of the client, even when discovery is unlikely. By this (lawful) reading of the rule, breaking the law is "likely to result in substantial injury to the organization" even if the violation is not likely to be discovered or prosecuted in the foreseeable future.

The rule identifies the general duty of the lawyer to act to protect the client and sets forth the process the lawyer should go through in determining what to do in such a circumstance, giving the lawyer significant guidance and (guided) discretion once the four elements noted above are met. Model Rule 1.13 details the applicable options for the lawyer in general terms, imposing a duty on the lawyer to consider the options in light of the significant circumstances, including the seriousness of the violation, its consequences, scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. In other words, the lawyer is charged with considering the totality of the circumstances. Although the rule refers to the "policies of the organization concerning such matters" this phrase should not be read to accept a policy that would perpetuate willful blindness. Such an interpretation is

81. See CHARLES WOLFRAM, MODERN LEGAL ETHICS § 13.7.5, at 740 (1986).

against public policy because it would violate the law, thwarting requirements and responsibilities created by law. For example, many environmental laws require that a corporate official certify that information is true, such as a certification that discharge levels are within the levels established by a permit issued under the Clean Air Act or the Clean Water Act. A corporate policy could not prevent a lawyer from advising the board of directors of a violation of these requirements because such a rule would circumvent the substantive environmental law at issue.

The specific measures the lawyer may consider include a wide range of responses. The lawyer may ask for reconsideration of the matter, advise the client that a separate legal opinion should be sought, or refer the matter to higher authority in the organization, including the highest authority under applicable law – typically the board of directors of the corporation. In the event that the problem is not solved by the recourse to these measures, the rule permits the lawyer to withdraw from the representation.

> If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.[82]

Although the rule does not mandate withdrawal directly, that step is dictated by circumstances if the client persists in using the lawyer's services in a way that violates the law.[83]

> In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

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82. MODEL RULE 1.13(b), (c).

83. *C.f.* MODEL RULE 1.16(a) (2002) (requiring withdrawal if the "representation will result in a violation of . . . law"), *with* 1.16(b)(2) (permitting withdrawal if the "client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent"), *and* 1.16(b)(3) (permitting withdrawal when the client has used the lawyer's services to perpetrate a crime or a fraud).

> (1) asking for reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.[84]

(4) In Pari Materia: Reading the Rules Together

The reporting requirement of Model Rule 1.13 appears to function as a contextual limit on the lawyer's duty to keep the client informed of developments relating to the representation set forth in Model Rule 1.4. While Model Rule 1.4 requires that the lawyer keep clients informed about matters relevant to the representation, Rule 1.13 mitigates this duty to fit the perceived needs of the corporate enterprise. Model Rule 1.13 employs an "up the ladder" reporting approach, requiring that lawyers consult with intermediaries before reporting to the highest authority within the client (the board of directors) on an issue of importance to the client. Model Rule 1.13 thus treats the organization's constituents as able to act for the client unless some significant harm to the organization is clear. This approach gives leeway to the constituent authorized to speak or act for the corporation although the lawyer may not agree with the judgments that constituent makes.

> When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter.[85]

Arguably, the lawyer has an independent right to counsel the client to comply with the law under Model Rule 1.2. The lawyer's ability to advise a corporate representative who is not involved in the violation is unclear, however, because the more specific mandate of Model Rule 1.13 seems to control the lawyer's conduct when a violation is at issue.

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84. MODEL RULE 1.13(b) (2002).
85. MODEL RULE 1.13 cmt. 3.

III. RECENT DEVELOPMENTS

The law is evolutionary, always subject to progress and change. Because of the importance of investor confidence to the overall health of the economy, Congress has sought to enhance corporate accountability in hopes of restoring investor confidence in the market. The heightened demand for corporate accountability resulting from these developments can be seen on many levels, including the new legislation and regulations relating to corporate disclosures. The financial industry, business groups, and other organizations have sought to encourage voluntary disclosure of financial information material to investor choice.[86] The ABA is currently studying changes in the Model Rules that would make the rules more compatible with this legislation and the need for accountability in today's economy.[87] The following section focuses on two recent developments in the law of ethics rules and positive law that are likely to have significant effects on the role of corporate counsel: (1) the revisions to the ABA Model Rules of Professional Conduct and (2) the newly promulgated requirements of the Sarbanes-Oxley Act of 2002.[88]

The 2002 Revision of the ABA Model Rules

The ABA Commission on Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000 Commission," studied the ABA Model Rules of Professional Conduct for four years before presenting its proposed revisions to the American Bar Association House of Delegates.[89] On February 5, 2002, after debating and amending the proposal, the ABA House of Delegates passed Report 401, adopting the first comprehensive

86. *See* Jonathan D. Glater, *Price-Waterhouse Taking a Stand, and a Big Risk, available at* http://www.nytimes.com/2003/01/01/business/01AUDI.html?todaysheadlines (Jan. 1, 2003) (noting nation's largest accounting firm took a public stance favoring more thorough, detailed audits to prevent corporate fraud).

87. The American Bar Association adopted revisions to the Model Rules of Professional Conduct in February 2002. In March of 2002, the ABA appointed a task force to consider amending the Model Rules to enhance the protection of the public against corporate fraud. The ABA Task Force on Corporate Responsibility, chaired by James H. Cheek of Nashville, Tennessee, issued a preliminary report on July 16, 2002, recommending amendments to Model Rule 1.6 and others to bring the rules into consistency with the majority rule allowing disclosure in situations of serious harm to "improve corporate responsibility and enhance public trust in corporate integrity." *See* Letter of A.P. Carlton of December 18, 2002 to the Securities and Exchange Commission, Jonathan G. Katz, Secretary, Re: File No. S7-45-02, *available at* http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm (last visited Mar. 28, 2003).

88. The Sarbanes-Oxley Act § 307 ordered the SEC to promulgate regulations to require lawyers representing corporations subject to the Act to report evidence of material violations of securities regulations to authorities within the corporation. In response to the Act, the SEC has promulgated proposed and final rules on the reporting inside and outside the corporate entity.

89. Honorable E. Norman Veasey, the chair of the Ethics 2000 Commission, moved the House to consider adoption of the amendments to the rules as House Report 401.

revision of the Model Rules in over two decades. Although the Model Rules have no direct application to any lawyer, they provide a model for state ethics rules. Moreover, they are the articulation of lawyer responsibility by the largest organization of lawyers in the country,[90] and the vast majority of states use the Model Rules to develop their standards of conduct and adopt the Model Rules without significant modification for most rules.[91] As the above discussion indicates, the ABA changed Model Rule 1.6, acknowledging that lawyers may be required by other law to disclose client information in some cases. Moreover, the ABA has authorized additional study of the rule in light of the Sarbanes-Oxley Act.[92] The most significant changes in the Model Rules revisions from the perspective of corporate counsel relate to the duty of confidentiality.

(1) 2002 Revision to Model Rule 1.6

The 2002 revision to Model Rule 1.6 included significant changes. It adopted four of six exceptions proposed by the Ethics 2000 Commission, adding two exceptions to the two already appearing in the 1983 version of the rule. The revision also ameliorated the effects of the absolute nature of the 1983 rule by simplifying the exception to prevent death or bodily harm. Revised Model Rule 1.6 provides as follows:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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90. The ABA represents over 400,000 member-lawyers in the U.S.

91. North Carolina appears to be the first state to revise its rules of legal ethics based on the completed revision of the ABA Model Rules. Although the North Carolina bar determined that it would accept the approach of the Model Rules absent compelling reasons to change the rule, it departed from the 2002 Model Rules in several significant respects, including the rule on confidentiality. *See North Carolina Adopts Rule Allowing MJP, Other Recent Changes to ABA Model Rules*, 71 U.S.L.W. 2579, 2580 (Mar. 18, 2003). Additionally, Tennessee considered the ABA Proposed Rules as part of its study of its rules revision process.

92. The ABA Task Force on Corporate Responsibility, chaired by James H. Cheek of Nashville, Tennessee, issued a preliminary report on July 16, 2002, recommending amendments to Model Rule 1.6 and others to bring the rules into consistency with the majority rule allowing disclosure in situations of serious harm to "improve corporate responsibility and enhance public trust in corporate integrity." *See* Letter of A.P. Carlton of December 18, 2002 to the Securities and Exchange Commission, Jonathan G. Katz, Secretary, Re: File No. S7-45-02, *available at* http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm (last visited Mar. 28, 2003).

> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to secure legal advice about the lawyer's compliance with these Rules;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (4) to comply with other law or a court order.[93]

Revised Model Rule 1.6 authorizes permissive disclosure when it is necessary to prevent "reasonably certain death or substantial bodily harm,"[94] to "secure legal advice" about compliance with the Model Rules, and to comply with "other law or a court order." It retains the exception authorizing lawyers to disclose client information "to establish a claim or defense on behalf of the lawyer." The amendment allowing lawyers to disclose client information to prevent reasonably certain death or substantial bodily harm cured one of the most dramatic problems of Rule 1.6. This provision changed the rule to allow disclosures in circumstances of peril without requiring a finding by the lawyer that the conduct at issue constitutes a crime. Because of the importance of protecting individuals, the revised exception dropped the requirement that the death likely to occur be imminent. The client's right to privacy and expectation of confidentiality should not protect a client intending to harm others in significant ways.[95] Allowing or encouraging lawyers to remain silent in the face of peril to others is against public policy. Moreover, in some circumstances, silence may amount to fraud or violation of a statutory duty to disclose. For example, environmental statutes create a duty to disclose information. Securities law and even a common law duty (such as the duty to warn recognized in the *Tarasoff* case) can create a duty to speak.[96] Case law indicates that lawyers sometimes appropriately disclose client information in self-defense even before a formal ac-

93. MODEL RULE 1.6(b) (2002).
94. MODEL RULE 1.6 (b)(1).
95. This statement takes the clearest case of a right of the lawyer to disclose client information to prevent harm by a client. The exception of MODEL RULE 1.6(b)(1) (revised 2002) to prevent death or substantial bodily injury allows the lawyer to disclose client information to prevent the harm whether or not the conduct at issue is that of the client.
96. *See generally,* George D. Reycraft, *The Role of Counsel in Corporate Acquisitions and Takeovers: Conflicts and Communications; Articles and Essays: Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605 (1988).

tion is filed.[97] A new comment to Revised Model Rule 1.6 emphasizes that lawyers should seek to "persuade the client to take suitable action to obviate the need for disclosure."[98]

(2) Exceptions in the Proposed Model Rule 1.6

The Ethics 2000 Commission proposed six exceptions to the broad prohibition. Like the 1983 rule, all the exceptions were permissive, requiring disclosure of client information in no case. The proposed rule would have created two additional bases for disclosure, but would have allowed disclosure only in situations in which a client has no rightful expectation of confidentiality because in each situation the client is using the lawyer's services to further a crime or fraud. Subsections (b)(2) and (b)(3) to the proposed rule would have allowed a lawyer to reveal client information when the lawyer reasonably believed necessary:

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [and]
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Although the ABA House of Delegates rejected these exceptions, many states currently include exceptions permitting disclosure of client information in such circumstances.[99] Subsection (b)(2), the first of the two rejected exceptions, would have allowed disclosure necessary to prevent "substantial injury to the financial interests or property of another." Subsection (b)(3) would have allowed disclosure to "mitigate or rectify substantial injury to the financial interests or property of another." Although these exceptions would have expanded the bases for disclosure, they would have done so only in the rare circumstances of criminal or fraudulent conduct by a client who is misusing the lawyer's services to further the culpable enterprise. The rejection of these proposed changes means that lawyers are for-

97. *See, e.g., In re* Bryan, 61 P.3d 641 (Kan. 2003) (holding that lawyer need not "wait until the commencement of an action or proceeding before using information to protect himself," but that the lawyer involved in the case disclosed client's "confidential information beyond what was necessary and allowed"). *See id.* at 655.

98. MODEL RULE 1.6 cmt. 12 (2002).

99. Additionally, Rule 205, promulgated pursuant to the Sarbanes-Oxley Act, makes these exceptions applicable to lawyers practicing before the SEC in stated circumstances.

bidden to exercise their judgment to decide whether harm to a third party or the public justifies disclosure of client information – even when the client has used or is using the lawyer's services to further wrongful and damaging activity.[100] Some jurisdictions provide protection for the financial interest of third parties.[101] Some include "fraudulent" as well as criminal acts within the exception for harm, extending greater protection to third parties.[102] Many allow disclosures to "rectify fraud" when the attorney's services have been used to further a fraud.[103] These exceptions are incorporated in Rule 205 promulgated pursuant to the Sarbanes-Oxley Act of 2002, which is discussed in Part III of this article.

The Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 mandated new regulations aimed at preventing future frauds on shareholders and the public. The Act provides an example of the public and governmental concern relating to corporate fraud. In addition to setting new requirements on CEOs and CFOs of corporations subject to SEC regulation,[104] and offering protection to employees of issuers who provide information about violations of securities laws to the SEC,[105] the Act required new regulations of accountants and lawyers. Sec-

100. *See* Irma S. Russell, *Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality*, PROF'L LAW. 19 (Spring 2002).

101. *See, e.g.,* ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); CONN. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2002); HAW. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); N.H. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); N.M. RULES OF PROF'L CONDUCT R. 16- 106(c) (2002); N.D. RULES OF PROF'L CONDUCT R. 1.6(d) (2002); PA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2002); TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2002); Utah RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); WIS. RULES OF PROF'L CONDUCT R. 20:1.6(b) (2002).

102. *See, e.g.,* ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); HAW. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); N.D. RULES OF PROF'L CONDUCT R. 1.6(d) (2002); TEX. RULES OF PROF'L CONDUCT R. 1.05(c) (2002); UTAH RULES OF PROF'L CONDUCT R. 1.6(b) (2002); WIS. RULES OF PROF'L CONDUCT R. 20:1.6(b) (2002).

103. *See, e.g.,* CONN. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2002); HAW. RULES OF PROF'L CONDUCT R. 1.6 (2002); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2002); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002); MICH. RULES OF PROF'L CONDUCT R. 1.6(c)(3) (2002); MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002); NEV. RULES OF PROF'L CONDUCT R. 156(3)(c) (2002); N.J. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2002); N.C. RULES OF PROF'L CONDUCT R. 4(d)(5) (2002); N.D. RULES OF PROF'L CONDUCT R. 1.6(f) (2002); OKLA. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002); PA. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2002); TEX. RULES OF PROF'L CONDUCT R. 1.05(c)(8) (2002); UTAH RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002); WIS. RULES OF PROF'L CONDUCT R. 20:1.6(c) (2002).

104. *See* Sarbanes-Oxley Act of 2002, § 302.

105. *See* Sarbanes-Oxley Act of 2002, P.L. 107-204, § 806 (to be codified at 18 U.S.C. § 1514A), *available at* http://www.oalj.dol.gov/public/wblower/refrnc/107_204_806.htm (last visited Apr. 7, 2003).

tion 307 of the Act requires that lawyers report evidence of material violations of securities law, fiduciary duty or similar violations "to the chief legal counsel or the chief executive of the company."[106] In some circumstances, the Act mandates that the lawyer also report "to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors."[107]

SEC Rule 205

Pursuant to Section 307 of the Sarbanes-Oxley Act, the SEC issued its proposed rule on attorney conduct in November 2002.[108] On January 29, 2003, the SEC finalized part of Rule 205.[109] The discussion of the Proposed Rule on Implementation of Standards of Professional Responsibility speaks to the role of lawyers.

> Attorneys prepare, or assist in preparing, materials that are filed with or submitted to the Commission by or on behalf of issuers. Public investors rely on these materials in making their investment decisions. Thus, the Commission, and the investing public, must be able to rely upon the integrity of in-house and retained lawyers who represent issuers before the Commission. Attorneys also play an important and expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws.[110]

After considering comments from the ABA, law firms, lawyer insurers, law professors, and other interested parties, the SEC adopted a final rule relating to the up-the-ladder reporting requirement and published a new proposed rule regarding noisy withdrawal and disclosure outside the corporate entity.[111] Final Rule 205 requires lawyers to report within the corporate

106. 15 U.S.C. § 7245(1) (2002).
107. *Id.*
108. *See* 71U.S.L.W. 2316 (Nov. 12, 2002).
109. *See* 68 F.R. 6296-01 (Feb. 6, 2003) (stating effective date is 180 days after its publication in the Federal Register). *See also SEC OKs Narrowed Lawyer Conduct Rules, Delays Action on 'Noisy Withdrawal' provisions*, 71 U.S.L.W. 2471, 2472 (Jan. 28, 2003).
110. S.E.C. Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 CFR Parts 205, 240, 249, [Release Nos. 33-8186; 34-47282; IC-25920; File No. S7-45-02] RIN 3235-AI72. Implementation of Standards of Professional Conduct for Attorneys, *available at* http://www.sec.gov/rules/proposed/33-8186.htm) (last visited Apr. 5, 2003) (describing the role of lawyers).
111. *See* S.E.C. Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 CFR Part 205.3(d)(2). Comments about the new regulation were generally supportive of the basic purpose of Rule 205 of restoring investor confidence in the market. *See, e.g.*, ABA Letter of December 18, 2002 to the Securities and Exchange Commission,

structure evidence of a material violation of securities law or a breach of fiduciary duty or other similar serious violation of the law. It applies to lawyers appearing and practicing before the Commission.[112]

Reading Rule 205 and Model Rule 1.13 Together

While the presumption of regularity may sometimes justify the "up the ladder" approach, Model Rule 1.13 also provides a basis for a lawyer to refrain from going to the board of directors when a constituent is violating the law. Rule 205 changes the "up the ladder" approach of Model Rule 1.13 when the lawyer knows that a material violation of securities law is being committed.[113] Although Model Rule 1.4 indicates that lawyers should address concerns directly to the client, Model Rule 1.13 modifies this approach in the corporate setting, preferring to allow the corporate constituent or intermediary to decide the issue unless "[c]lear justification exist[s] for seeking review over the head of the constituent normally responsible for it."[114] Thus, the board of directors (the client) will not learn of a problem unless the lawyer pursues the problem through several stages up the ladder. The failure to bring the problem to the board creates a situation in which management can persist in fraudulent activity without check, as has been seen in recent cases. SEC Rule 205 appears to destroy the justification for inaction by a lawyer who knows of a violation of law in the context of securities law spoken to in the rule.

IV. THE REQUIREMENTS OF LAW

Just as the Model Rules do not "exhaust the moral and ethical considerations,"[115] they do not exhaust applicable legal requirements. In addition to being accountable under legal ethics rules, lawyers are subject to other law, including state and federal statutes and common law.[116] Law embodied in statutes and case law is not abrogated by the ethics rules.[117] "The operation of law external to the law of lawyering, – other law – will sometimes 'force' further exceptions, regardless of what a disciplinary code might say."[118] For example, Rule 11 of the Federal Rules of Civil Procedure re-

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Attention Jonathan G. Katz, at 2 (noting ABA's support for the mission of "seeking to restore a culture of integrity and confidence in our financial markets that will warrant the trust of the American public") (on file with author).

112. 17 C.F.R. Part 205.2(a).

113. SEC Rule 205, discussed *supra* notes 108-12 and accompanying text, addresses this issue directly.

114. MODEL RULE 1.13 cmt. 3 (2002).

115. *See* MODEL RULES, scope, para. 16.

116. *See, e.g.*, Bennett v. Berg 710 F.2d 1361 (8th Cir. 1983) (refusing to dismiss on RICO claim against lawyers).

117. MODEL RULES, scope, para. 5-7.

118. 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 1.6:109, at 168.1-.2; *see also*

quires lawyers to engage in inquiry concerning a matter asserted in litigation. Some environmental laws and regulations require any person with knowledge to report a violation to authorities, and lawyers are not generally exempt from law by virtue of their role as lawyers.[119]

Model Rule 1.6 acknowledges the superior interests of others in some circumstances, allowing disclosure to prevent death and to comply with law. Additionally, Model Rule 3.3 imposes a duty on lawyers not to mislead a tribunal. It prohibits lawyers from offering evidence "that the lawyer knows to be false"[120] and from making a "false statement of material fact or law to a tribunal."[121] It creates significant duties of disclosure in formal proceedings before a tribunal.[122] Model Rule 3.3 provides the strongest counterbalance to Model Rule 1.6, expressly noting that the duty of candor applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6."[123] The Rule stops short of creating an affirmative duty on the lawyer to police the conduct of his clients or monitor or certify statements of the client to a court or to a government agency. Moreover, its mandate does not appear to reach transactional representations. Thus, lawyers serving clients in purchases or other matters not proceeding under the supervision of a court or administrative body seem to be outside the control of Model Rule 3.3. Rule 205, promulgated as a result of the Sarbanes-Oxley Act appears to give the SEC preference in the same way Model Rule 3.3 creates an obligation of candor to the court. Lawyers subject to Rule 205 cannot seek refuge in the contours of Model Rule 1.13 and, as a result of the rule, must report to the board of directors or its delegate information about illegal conduct of employees or constituents when constituents refuse to correct a violation of law.[124]

George D. Reycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605 (1988) (noting cases brought against lawyers alleged to have assisted clients in committing securities law violations); Barbara Glesner-Fines, *Looking Ahead at Lawyer Liability to Non-Clients*, 37 SO. TX. L. REV. 1283 (1996).

119. *See, e.g.*, Clean Air Act 113(c)(2), *codified at* 42 U.S.C. § 7413(c)(2) (1994); N.J. STAT. ANN. § 58:10A-21 - 37 (West 1992). The New Jersey Administrative Code, which implements the Act, provides that "any person including *but not limited to* the owner or operator of an underground storage tank system" shall report the release after confirming its existence to the local health agency. N.J. ADMIN. CODE tit. 7, § 14B-7.3(a) (1990) (emphasis added).

120. MODEL RULE 3.3 (a)(4) (2002).

121. MODEL RULE 3.3 (a)(1).

122. *See* People v. DePallo, 754 N.E.2d 751 (N.Y. Ct. App. 2001) (holding that an attorney confronted at trial with knowledge of his client's perjury has a duty to reveal that information to the court); Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906 (2001) (holding in-house counsel who sued former employer may disclose relevant facts to her lawyer, including privileged communications and client confidences).

123. MODEL RULE 3.3(b).

124. Directors also have a duty to report illegal conduct to the corporation's board of directors. *See In re* Caremark Int'l, Inc. Derivative Sec. Litig., 698 A. 2d 959 (Del. Ch. 1996).

Limitations on the Duty of Confidentiality

Generally, the duty of confidentiality protects a lawyer's silence except when a disclosure is necessary to prevent future significant harm. Revised Model Rule 1.6 sets forth exceptions to the duty of confidentiality to prevent harm and to comply with law.[125] Even without such an acknowledgement in the Rule, the obligation of law applies to lawyers as well as to others.[126]

The Attorney-Client Privilege and Corporate Counsel

Whether discussions between corporate officials and the lawyer serving as in-house counsel are protected by the attorney-client privilege depends on a variety of factors. In the course of day-to-day operations of the company, in-house counsel may be consulted regarding personnel and other management matters. Comment 35 to Revised Model Rule 1.7 gives guidance to lawyers who serve on boards of corporations or other organizations. Whether the lawyer's role in these discussions is that of a legal advisor or as a corporate officer can be difficult to ascertain.[127] An addition to the comment in the 2002 revision cautions lawyers to advise clients and members of the board of directors "that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of a director might not be protected by the attorney-client privilege."[128] The comment also notes that lawyers may need to advise clients that the lawyer should recuse himself as a director in some circumstances because of conflict of interest considerations.[129]

One of the primary vehicles for protecting clients from required disclosure of information and documents sought in discovery is the attorney-client privilege.[130] The privilege applies to evidence acquired or created as a result of consulting a lawyer for legal advice.[131] All states and the federal

125. MODEL RULE 1.6(b)(1), (4).
126. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §63, REVISED MODEL RULE 1.6 (4); *see also* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).
127. *See, e.g.*, MODEL RULE 1.13 cmt. 7.
128. MODEL RULE 1.7 cmt. 35.
129. *Id.*
130. For a full discussion of each element of the privilege and the doctrine, *see* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (4th ed. 2001).
131. The privilege may extend to documents revealed to third parties helping the lawyer provide legal advice. *See* Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002) (holding privilege was waived as to documents client provided to accountants not hired to help provide legal advice).

government recognize the attorney-client privilege.[132] The privilege bars introduction of communications between a client and his lawyer and communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client.[133] The attorney-client privilege does not protect communications between a lawyer and client that further an ongoing criminal enterprise, however.[134] In cases of danger to another, as when a client uses the lawyer to further a crime or fraud, the attorney-client privilege will not protect client information from ultimate disclosure in court. Thus, clients engaged in ongoing wrongful conduct have no reasonable expectation that their lawyer will shield the information from discovery.[135] The crime-fraud exception denies protection to communications between a client and his lawyer when the lawyer's services are used to further a crime or fraud whether or not the lawyer knew the client was engaged in a crime or fraud.[136] If a communication is within the crime-fraud exception to the attorney-client privilege, the law requires disclosure of the client information under legal process. The exception to the duty of confidentiality permitting disclosure required by law acknowledges such a situation.[137] Thus, a corporate client or lawyer could be required to disclose client information relating to a crime or fraud committed by individuals within the corporation. "The attorney-client privilege in every jurisdiction provides that conversations between clients and lawyers (including communications between boards of directors and corporate counsel) are not protected by the

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132. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.1 (1986); *see also* Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (noting Fed. Rule of Evid. 501 encourages full and frank disclosures to lawyers).

133. United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995); *see also* Gerrits v. Brannen Banks of Florida, Inc., 138 F.R.D. 574 (D. Colo. 1991) (holding that attorney-client privilege barred discovery of corporate lawyer's communications with corporation as to merger, tender offer, and legal advice in shareholder securities fraud action).

134. *See, e.g.*, United States v. Horvath, 731 F.2d 557 (8th Cir. 1984) (distinguishing between attorney-client privilege for past criminal act and crime-fraud exception to privilege relating to ongoing criminal enterprise); *In re* Sealed Case, 107 F.3d 46 (D.C. Cir. 1997) (requiring showing of ongoing or imminent crime or fraud for exception to apply); Olson v. Accessory Controls and Equip. Corp., 757 A.2d 14 (Conn. 2000) (adopting civil fraud exception to attorney-client privilege and holding standard is satisfied by showing of probable cause to believe communication was made with intent to defraud, but finding exception not shown in case).

135. It is also possible that information, though confidential under Rule 1.6, is not privileged because the client information is not a communication. For example, eyewitness evidence is not excludable and, thus, a prosecutor could justifiably subpoena the lawyer to testify about the information if the evidence is essential to the case and cannot be obtained otherwise. *See* MODEL RULE 3.8(e) (2002). In the context of working inside a corporation, it is hard to conceive of how corporate counsel might witness a crime or fraud that is not a "communication," but the possibility should be noted.

136. *In re* Grand Jury Proceedings, 680 F.2d 1026 (5th Cir. 1982) (holding that lawyer's ignorance of intended crime does not affect applicability of exception).

137. *See* Model Rule 1.6(b)(4).

privilege when the client (or its agents, the board) is using the lawyer to commit a crime or fraud."[138]

Although lawyers should not make decisions for the client, they must urge compliance with law and must refrain from aiding a client in unlawful objectives. The Model Rules note the importance of compliance and the integral role of the lawyer in urging compliance with the law. "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings."[139] Both the system of legal ethics and the larger U.S. system of justice as a whole depend on voluntary compliance. A comment to Model Rule 1.6 notes the importance of the lawyer's role in advising clients to comply with the law. "Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[140] While compliance with the law may mean additional short-term costs, it results in long-term gains if the market presents a competitive field of law-abiding players rather than short-term shams, free riders, or fraudfeasors. "Most lawyers thus already do the right thing when faced with client securities law violations and breaches of fiduciary duty, but a few lawyers do not."[141] Moreover, assuming that lawbreakers obtain a competitive advantage can have no effect on the obligations of compliance. The fact that the market includes those willing to break the law for a competitive advantage cannot serve as a reason to relieve everyone of the burden of the law.

While the corporate lawyer should not assume lightly that management or other intermediaries would refuse to address a problem, the lawyer should be permitted by rules of ethics to proceed in a manner that would be deemed reasonable as a matter of tort law. The lawyer who fails to act in circumstances that would justify a report to the board of directors may face malpractice charges – whether the representation relates to securities law or

138. Comments of Professor Susan P. Koniak, Boston University School of Law; Roger C. Cramton, Stevens Professor of Law Emeritus, Cornell Law School; George M. Cohen, Edward F. Howrey Research Professor, University of Virginia School of Law, December 17, 2002 (File name: skoniak1.htm), Comments on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys [Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02], *available at* http://www.sec.gov/rules/proposed/s74502.shtml.

139. *See* MODEL RULES, pmbl., para. 16.

140. MODEL RULE 1.6 cmt. 2.

141. Comments of Richard W. Painter, Visiting Professor of Law, University of Michigan Law School, Ann Arbor, December 18, 2002, on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys [Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02], *available at* http://www.sec.gov/rules/proposed/s74502/rwpainter1.htm (last visited 4/9/2003).

other areas.[142] Thus, tort law recognizes a duty of care that is not fully incorporated into the regulatory scheme of the Model Rules. Like everyone else, the lawyer cannot escape the obligation imposed by the common law to avoid creating an unreasonable risk of harm to others.[143] Like everyone else, the lawyer should be allowed to protect himself against such liability as well as protecting investors and the public from the serious harm that can flow from securities fraud. "No lawyer representing a client before the Commission should be put in such a situation where the lawyer cannot use a full range of options, including disclosure and the threat of disclosure, to protect investors and the lawyer from financial injury at the hands of a client that has used the lawyer's services to perpetrate a fraud."[144]

V. CONCLUSION

If all men were angels we would not need laws, but if all lawyers were angels, we would still need ethics rules to draw the line between the lawyer's duties to the individual client and to society. Both law and rules of ethics define the obligation of lawyers, meaning that lawyers must further the objectives of the client while urging compliance with the law, while also modeling compliance with the law. Most lawyers serve their clients and the public interest, effectively balancing the duties owed to each.[145] This fact does not obviate the need for professional standards to articulate and define this balance. Nor does it mean that the legal profession should be free of regulation. Such a proposition is contrary to the principle of the rule of law because it elevates a class of individuals beyond the reach of the law. In a system of justice operating under the rule of law, the norms applicable to lawyers must constrain conduct that is contrary to the public good rather than assuming that all individuals who have achieved the status of lawyers will balance the needs of clients and society in all cases.

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142. *See* George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597 (1998)

143. *See* Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117 (1998).

144. Comments of Richard W. Painter, Visiting Professor of Law, University of Michigan Law School, Ann Arbor, December 18, 2002, on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys [Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02], *available at* http://www.sec.gov/rules/proposed/s74502/rwpainter1.htm (last visited 4/9/2003).

145. "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." MODEL RULES, pmbl., para. 11.